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No. 01-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

ROBERT C. JUBELIRER AND MATTHEW J. RYAN, et al.
Appellants

v.

RICHARD VIETH, et al.
Appellees

ON CONDITIONAL CROSS-APPEAL
FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT ON CONDITIONAL CROSS-APPEAL

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JULY 24, 2002

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QUESTIONS PRESENTED

1. Should this Court reconsider and overrule its decision in *Davis v. Bandemer*, 478 U.S. 109 (1986), that a claim of partisan gerrymandering presents a justiciable political question?

2. In a state where voters frequently and massively engage in cross-over and split-ticket voting, can voters who prefer the candidates of one party be considered an "identifiable political group" for purposes of asserting a partisan gerrymandering claim under *Davis v. Bandemer*, 478 U.S. 109 (1986)?

PARTIES

The parties to this conditional cross-appeal are the Presiding Officers of the Pennsylvania General Assembly: Robert C. Jubelirer, Lieutenant Governor and President *Pro Tempore* of the Senate of the Commonwealth of Pennsylvania and Matthew J. Ryan, Speaker of the House of Representatives of the Commonwealth of Pennsylvania ("Presiding Officers") (Cross-Appellants herein and Defendants below), and Richard & Norma Jean Vieth and Susan Furey (Cross-Appellees herein and Plaintiffs below).[1]

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[1] The Governor of Pennsylvania Mark Schweiker, then-Secretary of the Commonwealth Kim Pizzingrilli and the Commissioner of the Bureau of Commissions, Elections and Legislation Richard Filling ("Executive Officers") were also named Defendants below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

A. Factual Background 3

B. Procedural History 5

C. The Decision Below 6

D. Additional Proceedings 7

THE QUESTIONS ARE SUBSTANTIAL 8

A. Non-Justiciable Political Question 8

B. Identifiable Political Group 13

CONCLUSION 16

TABLE OF AUTHORITIES

FEDERAL CASES

Baker v. Carr, 369 U.S. 186 (1962) 9

Chapman v. Meier, 420 U.S. 1 (1975) 13

Davis v. Bandemer, 478 U.S. 109 (1986) ..... *passim*

Growe v. Emison, 507 U.S. 25 (1993) 13

Karcher v. Daggett, 462 U.S. 725 (1983) 15

Mobile v. Bolden, 446 U.S. 55 (1980) 14

O'Lear v. Miller, 2002 U.S. Dist. LEXIS 9533 (E.D. Mich. No. 01-72584, issued May 24, 2002) 12

O'Lear v. Miller, 2002 U.S. Dist. LEXIS 10010 (E.D. Mich. No. 01-72584, issued June 5, 2002) 12

Reynolds v. Sims, 377 U.S. 533 (1964) 13

White v. Weiser, 412 U.S. 783 (1973) 12

Wise v. Lipscomb, 437 U.S. 535 (1978) 13

CONSTITUTION

U.S. CONST. art. I, §2 ..... 3, 5

U.S. CONST. art. I, §4 ..... 3, 5

U.S. CONST. amend. XIV 3, 5, 6, 14

STATUTES

28 U.S.C. §1253 2

28 U.S.C. §2284(a) 6

42 U.S.C. §1983 6

PA. Act No. 2002-1 ..... *passim*

PA. Act No. 2002-34 7

RULES AND REGULATIONS

Fed. R. Civ. P. 12(b)(1) 6

Fed. R. Civ. P. 12(b)(6) 6

Supreme Court Rule 18.4 1

Supreme Court Rule 18.6 1

MISCELLANEOUS

Comment, *Davis v. Bandemer: Remedial Difficulties in Political Gerrymandering*, 37 EMORY L.J. 443 (1988) 16

Daniel Hays Lowenstein, "Bandemer's Gap: Gerrymandering and Equal Protection," POLITICAL GERRYMANDERING AND THE COURTS (Bernard Grofman, ed. 1990) 14

Unofficial Voter Registration Data Nov. 2001, PA Dept. of State (http://www.dos.state.pa.us/bcel/arc/elec_arc.html) 4

Unofficial 2001 Municipal Election Results (Supreme, Superior & Commonwealth Courts), PA Dept. of State, (http://web.dos.state.pa.us/elections/elec_results/dsf/elec_menu.cgi?eyear=2001&etype=M) 5

SB 1200 3

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ON CONDITIONAL CROSS-APPEAL
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THE MIDDLE DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT IN CONDITIONAL CROSS-APPEAL

INTRODUCTION

Presiding Officers, pursuant to Supreme Court Rule 18.4, file this Jurisdictional Statement in support of their conditional cross-appeal from the order at issue in Appeal No. 01-1873. Simultaneous with the filing of this Jurisdictional Statement, Presiding Officers, in their status as Appellees and pursuant to Supreme Court Rule 18.6, have filed a Motion to Dismiss or Affirm in response to the Jurisdictional Statement filed in Appeal No. 01-1873. This

cross-appeal has been brought in the interest of placing all disputed issues before this Court.[2]

OPINION BELOW

The February 22, 2002 opinion and order of the three-judge court below (Nygaard, C.J., Rambo and Yohn, D.J.) is reported at 188 F. Supp.2d 532, available electronically at 2002 U.S. Dist. LEXIS 3441, and contained in the Appendix filed in support of the Jurisdictional Statement in Appeal No. 01-1873 (pages 1a-33a). Citations herein are to 188 F. Supp.2d 532 and the filed Appendix.

JURISDICTION

It is asserted in the Jurisdictional Statement filed in Appeal No. 01-1873 that 28 U.S.C. §1253 provides the basis for this Court's appellate jurisdiction. In their Motion to Dismiss or Affirm, Presiding Officers dispute this basis for appellate jurisdiction and seek dismissal of Appeal No. 01-1873.

Should this Court, however, find jurisdiction appropriate in Appeal No. 01-1873, Presiding Officers ask

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[2] Three other appeals related to the litigation below are before this Court: No. 01-1817, No. 01-1823 and No. 01-1713. No. 01-1817 is a direct appeal by Presiding Officers from the April 8, 2002 order of the three-judge court enjoining the implementation of Act No. 2002-1 ("Act 1"). No. 01-1823 is a direct appeal by the Executive Officers from the same order. No. 01-1713 is a direct appeal by the Republican Caucus of the Pennsylvania House of Representatives from the February 22, 2002 order of a single judge of the three-judge court denying a motion to quash a subpoena issued to Carnegie Mellon University in connection with a contract between the Caucus and the University.

that jurisdiction over their conditional cross-appeal from the same order also be assumed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, §1 provides, in pertinent part: "No State shall ... deny to any persons within its jurisdiction the equal protection of the laws." U.S. CONST. art. I, §2, cl. 1, provides, in pertinent part, "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States ... ." U.S. CONST. art. I, §4, cl. 1 provides in pertinent part, "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof ... ."

STATEMENT OF THE CASE

A. Factual Background[3]

As a result of reapportionment following the 2000 Census, the Commonwealth of Pennsylvania lost two seats in Congress, going from 21 to 19. On January 7, 2002, a new state law ("Act 1") established district boundaries for the Commonwealth's 19 congressional seats.

When the Pennsylvania General Assembly recessed on December 13, 2001, different versions of the new redistricting plan (SB 1200) had been passed by the Pennsylvania Senate and the Pennsylvania House. SB 1200 was then considered by a Conference Committee, which reported a new version to the Senate and House. The final vote in the Senate on SB 1200 was 28-22; the final vote in the House was 132-59. Forty-two members of

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[3] This statement of factual background is derived from the allegations of the Amended Complaint, supplemented by facts of which judicial notice may be taken.

the House Democrat Caucus voted in favor of the bill, which would not have had a majority for passage without such bi-partisan support.

Based on unofficial November 2001 voter registration data, there are 3,733,739 registered Democrats, 3,233,171 registered Republicans, 3,266 registered Green party members and 803,365 other registered voters in Pennsylvania. *See* Am. Compl. ¶25; App. at 124a; Unofficial Voter Registration Data Nov. 2001, PA Dept. of State (http://www.dos.state.pa.us/bcel/arc/elec_arc.html). Using these data, Democrats account for 48%, Republicans account for 41.6% and others account for 10.3% of the registered voters. No party has a majority.

In the 2000 general election, 11 Republicans and 10 Democrats were elected to Congress. Am. Compl. ¶15; App. at 120a. In the five statewide elections held in 2000, Republicans won 3 races (U.S. Senator, Attorney General and State Treasurer) and Democrats won 2 races (President and Auditor General). Am. Compl. ¶27; App. at 125a.[4]

The Democrat party is not a minor party in the Commonwealth. *See* Am. Compl. ¶25; App. at 124a. Registered Democrat voters do not vote in a cohesive manner; rather, they engage in much cross-over and split-ticket voting. *See* Am. Compl. ¶25 (disregarding voters registered with minor parties or as non-affiliated, Democrats have a 53.6% to 46.4% advantage as between registered Democrat and Republican voters); App. at 124a. In five statewide races in 2000, only the Democrat

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[4] In Am. Compl. ¶27, other than for President, Plaintiffs allege the percent of the vote won by Republican and Democrat candidates based only on the totals for those two parties' candidates: U.S. Senator (53.5% R, 46.5% D); Attorney General (55.6%R, 44.4% D); Auditor General (41.3% R, 58.7% D); State Treasurer (51.1% R, 48.9% D). App. at 125a. These figures exclude votes for other candidates.

candidate for Auditor General received at least 53.6% of the vote. In the other four races, the largest percentage of Democrat votes (50.6%) was received by the Democrat candidate for President, while Democrat candidates for Attorney General, State Treasurer, and United States Senator all received less than 50% of the total votes cast for either a Democrat or Republican. As these data reveal, registered Democrats frequently and massively vote for Republican candidates; they are not a cohesive group.[5]

B. Procedural History

On January 11, 2002, Plaintiffs filed an Amended Complaint[6] for Declaratory and Injunctive Relief in the United States District Court for the Middle District of Pennsylvania against Presiding Officers, Executive Officers and the Commonwealth. App. at 116a-34a. Plaintiffs alleged that Act 1, *inter alia*, denied or abridged their right to vote for their Representative to the United States Congress in violation of U.S. CONST. art. I, §§2 and 4 and amend. XIV, §2 (Claim I) and denied them equal protection of the laws in violation of U.S. CONST. amend.

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[5] This trend continued in 2001 when Republicans won all 7 statewide elections for Supreme, Superior and Commonwealth Court. The Republican candidate for Supreme Court received 52.7% of all votes cast; the 3 Republican candidates for Superior Court received 55% of all votes cast; and the 3 Republican candidates for Commonwealth Court received 57% of all votes cast. *See* Unofficial 2001 Municipal Election Results (Supreme, Superior & Commonwealth Courts), PA Dept. of State (http://web.dos.state.pa.us/elections/elec_results/dsf/elec_menu.cgi?eyear=2001&etype=M).

[6] The initial complaint, filed December 27, 2001, challenged the 1992 congressional districting plan as unconstitutional in light of the 2000 Census data.

XIV, §1 (Claim II). App. at 131a.[7] Pursuant to 28 U.S.C. §2284(a), a three-judge court was convened.

On January 29, 2002, Presiding Officers and Executive Officers each filed motions to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6). Presiding Officers contended that Plaintiffs lacked standing and failed to state a claim on which relief could be granted on any of the claims of the Amended Complaint.

C. The Decision Below

On February 22, 2002, the three-judge court issued an opinion and order granting and denying Defendants' motions in part. 188 F. Supp.2d 532; App. at 1a-33a. The court dismissed all claims against the Commonwealth, under the doctrine of sovereign immunity, and dismissed Claims II-V for failure to state a claim. The court did not dismiss Claim I – the alleged violation of the one-person, one-vote principle.

In their motion to dismiss, Presiding Officers had objected to the justiciability of the partisan gerrymandering claim raised in Claim II. *See* 188 F. Supp.2d at 538; App. at 9a. Although the three-judge court considered itself bound by *Davis v. Bandemer*, 478 U.S. 109 (1986), to consider Claim II, it noted Presiding Officers' objection at the outset of its opinion. *See id.*

In addressing the motions to dismiss Claim II for failure to state a claim, the three-judge court first set forth the 3-prong *Bandemer* analysis: a plaintiff must "prove

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[7] Plaintiffs also alleged that Act 1 constituted an abridgment of the privileges and immunities of citizenship (Claim III) and denied or abridged their right to free association as guaranteed by amend. I (Claim IV). *See* Am. Compl ¶¶45-48; App. at 132a. Claim V alleged that the foregoing constitutional violations also violated 42 U.S.C. §1983.

both [1] intentional discrimination against an [2] identifiable political group and an [3] actual discriminatory effect on that group." 188 F. Supp.2d at 543 (quoting 478 U.S. at 127); App. at 20a. Although ultimately dismissing Claim II, the court ruled against Defendants on prongs one and two of the *Bandemer* analysis – discriminatory intent and "identifiable political group." With respect to prong two – "identifiable political group" – the court stated:

> Defendants contend that Plaintiffs have failed to allege facts demonstrating that Democrats in Pennsylvania vote as a block. However, Defendants do not point to any authority which would require such an allegation. The court has scoured the *Bandemer* decision and has found no such requirement. Instead, the court finds that *Bandemer* indicates that Plaintiffs must allege only that they are members of an identifiable political group whose geographic distribution is sufficiently ascertainable that it could have been used in drawing electoral district lines. Clearly, by alleging that they are Pennsylvania citizens who vote for Democrats, Plaintiffs have satisfied this requirement.

188 F. Supp.2d at 543-44; App. at 21a. The partisan gerrymandering claim was ultimately dismissed on the third prong of the analysis for failure to plead an "actual discriminatory effect."

D. Additional Proceedings

On March 11-12, 2002, the three-judge court heard evidence on the remaining claim. In a majority opinion issued April 8, 2002, Judges Nygaard and Rambo declared

Act 1 unconstitutional under the principle of one-person, one-vote and enjoined its implementation by Defendants.[8]

THE QUESTIONS ARE SUBSTANTIAL

A. Non-Justiciable Political Question

In *Bandemer*, this Court was asked whether a pure partisan gerrymandering claim presents a justiciable controversy or a non-justiciable political question. *See* 478 U.S. at 118. A majority of Justices, in an opinion delivered by Justice White, determined that such a claim is justiciable. Justice O'Connor, joined by then-Chief Justice Burger and then-Justice Rehnquist, concluded the opposite in an insightful concurrence, highlighting the flaws and dangerous presumptions undergirding the plurality opinion and predicting the inevitable failure of the analysis it set forth.

Time and experience have proven Justice O'Connor correct – "[t]he Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims, and no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment." *Id.* at 147 (O'Connor, J., concurring in the judgment only). The Court

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[8] The propriety of the April 8, 2002 decision is the subject of Appeal Nos. 01-1817 and No. 01-1823. Following the invalidation of Act 1, the Pennsylvania General Assembly, on April 17, 2002, passed a bill containing a revised congressional redistricting plan. On April 18, 2002, the Governor signed the bill into law as Act No. 2002-34. Act 1 will still be used for this congressional election cycle but will be superseded by Act 34 for the 2004 congressional elections. On April 23, 2002, the three-judge court stayed the injunction imposed by the April 8, 2002 order. A request for a stay had also been submitted to Justice Souter of this Honorable Court but was withdrawn when the injunction was stayed by the issuing court.

should reconsider and overrule *Bandemer* and acknowledge that a partisan gerrymandering claim brought by a major political party presents a political question into which the judiciary cannot inquire.

A legal action presents a non-justiciable political question where there is a "'lack of judicially discoverable and manageable standards for resolving it,'" or where "'the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion is apparent.'" *Bandemer*, 478 U.S. at 148 (O'Connor, J., concurring in the judgment only) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Justice O'Connor explained in her *Bandemer* concurrence that allowing a major political group to bring a partisan gerrymandering claim forces the judiciary to favor "some form of rough proportional representation for all political groups," thus presupposing an initial policy determination forbidden to the judiciary. *Id.* at 145. Past precedent establishing the one-person, one-vote principle and adjudicating the rights of racial minority groups reveals that it is the individual's right to vote – not the right of the group – that is the appropriate subject of judicial protection. Extending such protections to major political groups overlooks the realities of the nation's two-party political system:

> Clearly, members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group; these political parties *are* the dominant groups and the Court has offered no reason to believe that they are incapable of fending for themselves ... each major party presumably has ample weapons at its disposal to conduct the partisan struggle that often leads to a partisan apportionment, but also often leads to a bipartisan one.

Id. at 152 (emphasis in the original).

Justice O'Connor also explained why the analysis for partisan gerrymandering claims crafted by the plurality is itself evidence that a judicially-manageable standard is impossible in this context, as it will inevitably evolve towards "some loose form of proportionality." *Id.* at 155. She predicted that extending the rights protected by vote dilution analysis to groups would complicate judicial review by increasing the number of competing claims to equal group representation, *id.* at 156, and noted the additional layer of complexity added by the fact that individuals' voting patterns are not immutable. *See id.* For the judiciary to adjudicate a partisan gerrymandering claim under the *Bandemer* plurality's analysis, they must look for "some form of 'undue' disproportionality with respect to electoral success ... because otherwise they will find their decisions turning on imponderables such as whether the legislators of one party have fairly represented the voters of the other." *Id.* at 157.

Justice O'Connor also predicted the inevitable consequence of holding partisan gerrymandering justiciable and the havoc it would wreak upon the judiciary as it tried to negotiate the redistricting thicket:

> The step taken today is a momentous one, which if followed in the future can only lead to political instability and judicial malaise. *If members of the major political parties are protected by the Equal Protection Clause from dilution of their voting strength, then members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests should be able to bring similar claims. Federal courts will have no alternative but to attempt to recreate the complex process of legislative apportionment in the context of adversary litigation* in order to reconcile the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups.

> Even if there were some way of limiting such claims to organized political parties, *the fact remains that the losing party or the losing group of legislators in every reapportionment will now be invited to fight the battle anew in federal court.* Apportionment is so important to legislators and political parties that the burden of proof the plurality places on political gerrymandering plaintiffs is unlikely to deter the routine lodging of such complaints. Notwithstanding the plurality's threshold requirement of discriminatory effects, the Court's holding that political gerrymandering claims are justiciable has opened the door to pervasive and unwarranted judicial superintendence of the legislative task of apportionment. There is simply no clear stopping point to prevent the gradual evolution of a requirement of roughly proportional representation for every cohesive political group.

Id. at 147 (emphasis added).

This case is the incarnation of Justice O'Connor's fears. The 2002 congressional elections could well change the balance of power in the United States Congress, which currently is composed of 222 Republicans, 211 Democrats and 2 Independents. The redistricting plans to be put in place under the 2000 Census offered an opportunity to both major parties to attempt to influence state legislatures to draw districts that held greater promise of electing members of their party. If a party perceived that a state's enacted plan would change the balance of representatives in that state, as happened here, there was great incentive to litigate a partisan gerrymandering claim and attempt to get the federal court to draw the plan. Since federal courts are not permitted to undertake constitutional partisan gerrymandering, there was hope that an expected loss of seats could be prevented.

A situation very similar to that which occurred in Pennsylvania took place in Michigan. Plaintiffs in *O'Lear v. Miller*, 2002 U.S. Dist. LEXIS 9533 (E.D. Mich. No. 01-72584, issued May 24, 2002), challenged the newly-drawn congressional redistricting plan, alleging that use of the plan would result in the election of 10 Republicans to the 15 congressional seats allocated to Michigan after the 2000 census, while in the 2000 election under the 1992 court-drawn Michigan congressional redistricting plan, Democrats had won 9 of the 16 congressional seats Michigan had under been apportioned under the 1990 Census. The plaintiffs' primary allegation of injury, as here, was "disproportionate representation and its potential to continue for a prolonged period of time." *O'Lear*, 2002 U.S. Dist. LEXIS 9533 at *4.

The three-judge federal court in Michigan dismissed the partisan gerrymandering claim because plaintiffs, similar to here, had not "alleged that they have been shut out of the [political] process or that the challenged congressional redistricting plan is one from which they cannot recover or substantially improve upon." *O'Lear*, 2002 U.S. Dist. LEXIS 9533 at *11.[9]

In both Pennsylvania and Michigan, the plaintiffs wanted the federal courts to throw out a congressional redistricting plan enacted pursuant to that state's legislative process. To permit challenges to duly-enacted congressional redistricting legislation on the basis of partisan gerrymandering delegitimizes the political process that this Court has recognized time and again as the preferred method for redistricting. *See e.g., White v. Weiser*, 412 U.S. 783, 794-96 (1973) ("From the beginning,

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[9] The three-judge court gave the plaintiffs in *O'Lear* an opportunity to file an amended complaint. On June 5, 2002, the amended complaint was also dismissed for failure to state a claim. *See O'Lear v. Miller*, 2002 U.S. Dist. LEXIS 10010.

we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination;' ... Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task") (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)); *Wise v. Lipscomb*, 437 U.S. 535, 539-540 (1978) (noting that "[t]he Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt"); *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("'reapportionment is primarily the duty and responsibility of the State through its legislative or other body, rather than of a federal court.'") (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

B. Identifiable Political Group

The *Bandemer* plurality, despite setting forth the requirement that a plaintiff allege and prove the existence of an "identifiable political group" to support a partisan gerrymandering claim, did not address whether such had been established in that case and provided no guidance on how that fact would be determined in subsequent actions.[10] In the wake of *Bandemer*, lower courts addressing partisan gerrymandering claims have paid scant, if any, attention to the requirement of an "identifiable political group." The Court now has an opportunity to elucidate the meaning of that requirement, which the plurality in *Bandemer* saw fit to include in its constitutional analysis.[11]

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[10] The *Bandemer* plurality noted only "[t]hat the characteristics of the complaining [political] group are not immutable or that the group has not been subject to the same historical stigma [as racial groups] may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case." 478 U.S. at 125.

[11] Justice O'Connor urged that neither major political party should be allowed to bring a claim for partisan gerrymandering:

In defining an "identifiable political group," the Court should draw guidance from Justice Stevens' concurring opinion in *Mobile v. Bolden*, 446 U.S. 55 (1980). *Mobile* involved a challenge by Afro-American voters to the validity of the at-large election of the governing body of the city (a three-member commission). This Court reversed a decision of the Court of Appeals for the Fifth Circuit, which, among other things, had upheld a conclusion of the district court that the at-large election process violated U.S. CONST. amend XIV, §1. In his concurring opinion, Justice Stevens addressed the thorny problem of identifying an identifiable group of voters:

> ... In the line-drawing [i.e., districting or redistricting] process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders.
>
> From the standpoint of the groups of voters that are affected by the line-drawing process, it is also important to recognize that it is the group's interest in gaining or maintaining political power that is at

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> Clearly, members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group: these political parties *are* the dominant groups, and the Court has offered no reason to believe that they are incapable of fending for themselves through the political process.

478 U.S. at 152 (O'Connor, J., concurring in the judgment only) (emphasis in the original). One commentator suggests that "the cause of action the plurality is contemplating [in *Bandemer*] is not about Democrats and Republicans under normal conditions. It is about a political group suffering pervasive discrimination in the political process." Daniel Hays Lowenstein, "Bandemer's Gap: Gerrymandering and Equal Protection," POLITICAL GERRYMANDERING AND THE COURTS (Bernard Grofman, ed. 1990) at 83.

> stake. The mere fact that a number of citizens share a common ethnic, racial, or religious background does not create the need for protection against gerrymandering. *It is only when their common interests are strong enough to be manifested in political action that the need arises. For the political strength of a group is not a function of its ethnic, racial, or religious composition; rather it is a function of numbers – specifically the number of persons who will vote in the same way.*

Id. at 88 (Stevens, J., concurring) (emphasis added). *See also Karcher v. Daggett*, 462 U.S. 725, 754 (1983) (Stevens, J. concurring) ("As a threshold matter, plaintiffs must show that they are members of an identifiable political group whose voting strength has been diluted. They must first prove that they belong to a politically salient class ... .")

To constitute a "politically identifiable group," a group must be one whose members vote the same, i.e., a cohesive group. As one writer has suggested:

> In political gerrymandering, courts must find a correlation between Democrats and those who rigidly vote for Democratic candidates. ... To maintain a legitimate argument that 'Democrats' were unable to elect Democratic candidates, the plaintiff group must, with a least some degree of specificity, point out which persons were denied an effective vote. Merely asserting that some dynamic, amorphous group had its votes diluted cannot suffice. ... Those who occasionally cross over party lines to vote for non-Democrats widen the gap between plaintiff groups and their representative political group. Because individual preferences in voting have become so prevalent, few, if any, large political organizations today can

> assert that their members consistently vote along straight party lines.

Comment, *Davis v. Bandemer: Remedial Difficulties in Political Gerrymandering*, 37 EMORY L.J. 443, 479 (1988).

In this case, Plaintiffs' own allegations, which revealed widespread cross-over and split-ticket voting, should have been deemed fatal to their attempt to depict Democrat voters in Pennsylvania as an "identifiable political group." The three-judge court erred in ruling against Presiding Officers on this second prong of the *Bandemer* analysis.

CONCLUSION

This conditional cross-appeal presents this Court with an opportunity to review its earlier decision in *Davis v. Bandemer* deeming partisan gerrymandering claims justiciable and, should it opt to continue to recognize the justiciability of such claims, to clarify the scope of the second prong – "identifiable political group" – of the *Bandemer* analysis. If it does not dismiss the appeal in No. 01-1873 or summarily affirm the February 22, 2002 order of the three-judge court below, the Court should note probable jurisdiction and proceed to address the merits of the questions presented in this cross-appeal.

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Appellees.

On Conditional Cross-Appeal from the United States District Court for the Middle District of Pennsylvania

CONDITIONAL CROSS-APPELLEES' MOTION TO DISMISS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT 1

REASONS TO DISMISS 2

I. THE CROSS-APPEAL SHOULD BE DISMISSED .. 2

II. PARTISAN GERRYMANDERING CLAIMS ARE, AND SHOULD REMAIN, JUSTICIABLE 3

III. CONSISTENT WITH THE REQUIREMENTS SET FORTH IN *BANDEMER*, PLAINTIFFS IN THIS CASE ARE MEMBERS OF AN IDENTIFIABLE POLITICAL GROUP 5

CONCLUSION 8

TABLE OF AUTHORITIES

CASES Page

Branti v. Finkel, 445 U.S. 507 (1980) 7

Cook v. Gralike, 531 U.S. 510 (2001) 4

Davis v. Bandemer, 478 U.S. 109 (1986) . . . . . *passim*

Easley v. Cromartie, 532 U.S. 234 (2001) 6

Elrod v. Burns, 427 U.S. 347 (1976) 7

Republican Party of North Carolina v. Martin, 980 F.2d 943 (4th Cir. 1993) 6

Shaw v. Reno, 509 U.S. 630 (1993) 4

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 4

Washington v. Yakima Indian Nation, 439 U.S. 463 (1976) 2

Wesberry v. Sanders, 376 U.S. 1 (1964) 4

MISCELLANEOUS

Robert L. Stern, *et al.*, *Supreme Court Practice* (8th ed. 2002) 2-3

Cross-appellees – plaintiffs in the district court – hereby respond to the Jurisdictional Statement on Conditional Cross-Appeal filed by Robert C. Jubelirer, *et al.* in No. 02-135 (hereinafter "cross-appellants"). This cross-appeal is unnecessary and improper. Cross-appellants won all the relief they sought when they filed their motion to dismiss plaintiffs' partisan gerrymandering claims. Because cross-appellants do not seek to modify the judgment below, they should have raised the arguments included here as alternative bases for affirmance of the ruling dismissing plaintiffs' partisan gerrymandering claims. As we show here, moreover, neither argument raised in the conditional cross-appeal is substantial. The Court should reject both arguments, note probable jurisdiction in No. 01-1873, and dismiss this conditional cross-appeal.

STATEMENT

Plaintiffs, in the case docketed as No. 01-1873,[1] have appealed an order of a three-judge court dismissing their claim that the new Pennsylvania congressional redistricting map is an unconstitutional partisan gerrymander. In its opinion, the court held that Democratic voters are an "identifiable political group," J.S. App. 21a,[2] but the plaintiffs had not alleged sufficient discriminatory effects burdening that group to satisfy the requirements of *Davis v. Bandemer*, 478 U.S. 109 (1986), J.S. App. 21a-28a. Cross-appellants raise two issues. First, they ask the Court to overturn *Davis v. Bandemer* altogether and find political gerrymandering claims nonjusticiable. Second, they ask the Court, in the process of reinterpreting the phrase "identifiable political group," to reject appellants' political gerrymandering claims because of the existence of

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[1]For a more complete statement of this case, please refer to the Jurisdictional Statement filed in No. 01-1873.

[2]"J.S. App." cites are to the appendix to the Jurisdictional Statement in No. 01-1873.

cross-over voting in Pennsylvania. Although plaintiffs believe the district court's ultimate dismissal of their political gerrymandering claims was incorrect as a matter of law, *see* J.S. in No. 01-1873, the two issues raised in this conditional cross-appeal involve wholly unremarkable applications of well-established doctrines, as to which the district court did not err.

REASONS TO DISMISS

This cross-appeal is improper. Cross-appellants are appealing an order – the order dismissing the partisan gerrymandering claims – that they fully support and do not seek to alter. They are merely seeking to assert alternative bases for affirmance. A cross-appeal is not necessary for that purpose, as an appellee may defend a judgment "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered" by the lower court. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

Cross-appellants, moreover, have offered no persuasive reasons for this Court to revisit the justiciability of political gerrymandering claims under *Davis v. Bandemer*, nor have they established the need to reinterpret the meaning of "identifiable political group." Their arguments rest upon the mere recitation of decades-old concurrences and dissents from this Court and provide no factual or legal support from the intervening years that would cast any doubt on the two well-settled issues presented in cross-appellants' Jurisdictional Statement.

I. THE CROSS-APPEAL SHOULD BE DISMISSED.

In a multitude of cases, this Court has made clear that there is no need for an appellee or respondent to file a cross-appeal or cross-petition if it merely is seeking to preserve alternative legal theories supporting the judgment below that were not accepted by the lower court. *See* Robert L. Stern, *et al.*,

Supreme Court Practice § 635 (8th ed. 2002) (citing cases). Such legal theories are appropriately offered in the initial appeal as alternative bases for affirmance. But the appellee – seeking no alteration in the ruling it is defending – has no standing or reason to take on the role of cross-appellant. This cross-appeal should therefore be dismissed.

II. PARTISAN GERRYMANDERING CLAIMS ARE, AND SHOULD REMAIN, JUSTICIABLE.

The legal theories presented in this cross-appeal should be rejected. First, cross-appellants offer no innovative or compelling argument to support their request that this Court overrule *Davis v. Bandemer*, 478 U.S. 109 (1986). Rather, cross-appellants simply rehash arguments from a long-settled debate. The law in this area is clear – political gerrymandering claims are justiciable – and cross-appellants provide no reason for this Court to revisit that conclusion.

Cross-appellants rely on a purported lack of judicially manageable standards and a fear of political instability in support of their request to overturn *Bandemer*. *See* J.S. on Condit. Cross-App. at 8-11. The majority in *Bandemer*, however, considered and rejected that very argument. *See Bandemer*, 478 U.S. at 125. That some lower courts since *Bandemer* have confused matters by imposing unattainable requirements on political gerrymandering claims, *see* J.S. in Case No. 01-1873, at 13-23, does not impugn the holding of the *Bandemer* majority that such claims are justiciable. As the majority opinion made clear – and as argued in the Jurisdictional Statement filed in Case No. 01-1873 – it is certainly possible to adjudicate limited, manageable political gerrymandering claims that seek "a level of parity between votes and representation sufficient to ensure that significant minority voices are heard and that majorities are not consigned to minority status." *Bandemer*, 478 U.S. at 125 n.9. In any

event, the *Bandemer* decision has not produced anything like the "havoc" and "political instability" described by cross-appellants. *See* J.S. on Condit. Cross-App. at 10.

In seeking to overturn *Bandemer*, cross-appellants point to no decision of this Court (nor of any lower court) casting serious doubt on *Bandemer*.[3] If anything, recent decisions of this Court underscore the continued importance of limiting legislative overreaching by the States in the redistricting arena.

For example, the Court has held that States may not use their limited Article I power to dictate electoral outcomes, to advantage one class of candidates over another, or to frustrate the will of the majority of voters. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001); *see also Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). The same principles require stringent limits on the power of legislatures to predetermine the results of congressional voting through strategic line-drawing.

In addition, recent decisions by this Court clarifying racial gerrymandering law support the continued vitality of political gerrymandering claims. *See, e.g., Shaw v. Reno*, 509 U.S. 630 (1993) (holding unconstitutional those districting plans where race trumps traditional districting principles). Just as race may not predominate over traditional districting principles, neither should political parties draw district lines that advantage or disadvantage a group of voters while substantially disregarding traditional districting principles.

The *Bandemer* Court wisely recognized that, as with racial gerrymanders, the Constitution imposes certain limits on "invidiously discriminatory" partisan gerrymanders. *See Bandemer*, 478 U.S. at 125 (majority opinion). The continued

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[3]Nor do they cite any recent scholarship urging such a result.

justiciability of political gerrymandering claims helps preserve the basic constitutional principle, recognized in *Bandemer*, that "each political group in a State should have the same chance to elect representatives of its choice as any other group." *Id.* at 124.

III. CONSISTENT WITH THE REQUIREMENTS SET FORTH IN *BANDEMER*, PLAINTIFFS IN THIS CASE ARE MEMBERS OF AN IDENTIFIABLE POLITICAL GROUP.

Cross-appellants also urge this Court to refine the meaning of "identifiable political group" for purposes of alleging a valid partisan gerrymandering claim. According to cross-appellants, the group allegedly harmed in this case – defined to include voters who actually vote for Democratic candidates in general elections for Congress – cannot constitute a salient political group under *Bandemer*. Cross-appellants offer no rationale as to why additional guidance in this area is necessary, nor can cross-appellants cite a single lower-court decision indicating any difficulty with the idea of identifying a salient political group. The district court's resolution of this issue was entirely proper.

The three-judge panel in this case had no trouble dispensing with cross-appellant's "identifiable political group" contention, concluding, "Plaintiffs must allege only that they are members of an identifiable political group whose geographical distribution is sufficiently ascertainable that it could have been used in drawing electoral lines. Clearly, by alleging that they are Pennsylvania citizens who vote for Democrats, Plaintiffs have satisfied this requirement." J.S. App. 21a. The district court's conclusions find ample support in existing case law, and neither precedent nor logic suggests a contrary result.

Initially, *Bandemer* itself belies any claim that the instant case does not involve an identifiable political group. There, the Court found that the plaintiffs – whom the district court had described as "clearly belong[ing] to a politically salient class, those who *align* themselves with the Democratic Party," *Bandemer v. Davis*, 603 F. Supp. 1479, 1492 (S.D. Ind. 1984) (three-judge court) (emphasis added) – had stated a justiciable claim. *Bandemer*, 478 U.S. at 124. In *Bandemer*, this Court considered the same type of class as that identified in this case – one based on how people vote, rather than on their party registration – and found that such claims were cognizable under the Equal Protection Clause.

Moreover, the fact that not all *registered* Democrats always vote for Democratic candidates, *see* J.S. on Condit. Cross-App. at 16, hardly means that plaintiffs here are not an identifiable political group. *Cf. Republican Party of North Carolina v. Martin*, 980 F.2d 943, 956 n.23 (4th Cir. 1993) (holding that registered Republicans and Democrats who allege that they "have and will continue to vote for Republican candidates" have alleged "a sufficient degree of cohesiveness . . . in order to withstand a motion to dismiss"). It is voter performance, not voter registration, that establishes a politically salient class.

Not surprisingly, in the related context of racial gerrymandering, this Court has held that it is how people vote, rather than registration figures like those referenced by cross-appellants, that is critical to analyzing whether lines were based on race or politics. *See, e.g., Easley v. Cromartie*, 532 U.S. 234, 244-45 (2001) (noting that testimony at trial showed high level of cross-over voting, and thus voter registration figures did "not accurately predict preferences at the polls"); *id.* at 245 ("A legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior.").

The focus on how people vote, rather than their registration, is supported not only by redistricting cases, but also by more general equal protection case law concerning discrimination based on political beliefs. The Equal Protection Clause protects those who vote Democratic just as much as it protects those who register as Democrats. It is no more permissible, for example, to fire civil servants who tend to vote Democratic than it is to fire those who register with the Democratic Party. *See, e.g.*, *Branti v. Finkel*, 445 U.S. 507, 509-10 & n.4 (1980) (striking down patronage system that discriminated against those registered as Republicans and those, including the named plaintiff, who registered as Democrats but were "regarded" as Republicans); *Elrod v. Burns*, 427 U.S. 347, 351 (1976) (plurality opinion). Any other result would mean that the government would be free to discriminate against people based on how they *actually* vote because such a class is not protected by the Equal Protection Clause.

Finally, the simple political realities of this case bolster the notion that those tending to vote Democratic form a politically salient class for purposes of a *Bandemer* claim. As alleged by plaintiffs in this case, the Republican-controlled Pennsylvania General Assembly enacted a congressional map with many bizarrely shaped districts that honor none of the traditional redistricting criteria, including respect for communities of interest, municipal boundaries, incumbency protection, etc. *See* Case No. 01-1873, J.S. App. 116a-134a (complaint); *id.* 135a-137a (maps of Act 1). Recognizing the primary importance of voting patterns, rather than voter registration, the General Assembly created meandering districts with the single-minded goal of maximizing Republican advantage in the State's congressional delegation. *Id.* In so doing, they recognized the significance of Democratic voters as an identifiable group that needed to be "packed" and "fractured" to maximize bias in

favor of Republican candidates. It ill behooves cross-appellants, having orchestrated such a scheme, to come into court and deny that their intended victims are "identifiable."

CONCLUSION

For the foregoing reasons, the court should note probable jurisdiction in No. 01-1873 and dismiss the conditional cross-appeal as unnecessary and improper.

Respectfully submitted,

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181

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No. 02-135

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

ROBERT C. JUBELIRER AND MATTHEW J. RYAN, et al.
Appellants

v.

RICHARD VIETH, et al.
Appellees

ON CONDITIONAL CROSS-APPEAL
FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OPPOSING MOTION TO DISMISS IN CONDITIONAL CROSS-APPEAL

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9 pp

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 1

I. Partisan Gerrymandering 1

II. "Identifiable Political Group" 2

III. The Cross-Appeal Is Not Improper 3

CONCLUSION 5

TABLE OF AUTHORITIES

FEDERAL CASES

Brown v. Board of Education, 347 U.S. 483 (1954)..... 1

Davis v. Bandemer, 478 U.S. 109 (1986)..... 1, 2, 3

Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264 (1981)..... 5

Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971)..... 4

Pope v. Blue, 809 U.S. 392 (W.D. N.C. 1992), *aff'd* 506 U.S. 801 (1992)..... 2

Republican Party of North Carolina v. Martin, 980 F.2d 943 (4th Cir. 1992)..... 2

Roemer v. Board of Public Works, 426 U.S. 736 (1976)..... 4

Swarb v. Lennox, 405 U.S. 191 (1972)..... 4

RULES AND REGULATIONS

Former Supreme Court Rule 10.5..... 4

Former Supreme Court Rule 16.1(d)..... 4

Supreme Court Rule 18.4..... 3

Supreme Court Rule 18.6..... 3

Supreme Court Rule 18.8..... 1

DOCKETED CASE

Vieth v. Jubelirer and Ryan, No. 01-1873 (In the Supreme Court of the United States)..... 5

MISCELLANEOUS

Robert L. Stern, et. al., SUPREME COURT PRACTICE §6.35 (8th ed. 2002) 3

Robert L. Stern, et. al., SUPREME COURT PRACTICE §7.11 (8th ed. 2002) 4

Wright, Miller & Cooper, 17 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D §4040 (1988 & 2002 Supp.) 4

INTRODUCTION

Pursuant to Supreme Court Rule 18.8, Cross-Appellants Jubelirer and Ryan ("Presiding Officers") file this Brief in Opposition to the Motion to Dismiss the Conditional Cross-Appeal submitted by Richard Vieth, et. al (Cross-Appellees herein and Plaintiffs below).

ARGUMENT

I. Partisan Gerrymandering

Protesting that the justiciability of partisan gerrymandering claims has been "long-settled," the Vieth Cross-Appellees urge this Court not to revisit that issue. Motion to Dismiss at 3. It is, however, beyond question that a litigant may advocate in favor of a change in the law. If one party's characterization of an issue as "long-settled" could prevent this Court from reconsidering prior decisions in light of time and experience, important rulings such as *Brown v. Board of Education*, 347 U.S. 483 (1954), would never have occurred.

Presiding Officers, moreover, have provided a basis for the Court to reconsider its justiciability ruling in *Davis v. Bandemer*, 478 U.S. 109 (1986). This case represents the incarnation of all the fears enunciated by Justice O'Connor in her *Bandemer* concurrence and underscores why partisan gerrymandering claims should be nonjusticiable. The political party which lost its bid in the congressional redistricting battle in Pennsylvania's General Assembly has simply re-waged the battle in the federal courts. It is appropriate for this Court to contemplate whether a decision of the highest court in the land that facilitates this tactic is advisable.

II. "Identifiable Political Group"

In *Bandemer*, a plurality of this Court saw fit to require a plaintiff to prove the existence of an "identifiable political group" as an element of a partisan gerrymandering claim. *See* 478 U.S. at 127. Numerous lower courts, in addressing such claims, have simply skipped this prong of the test.[1]

While, as the Vieth Cross-Appellees point out, in one case, an appellate court agreed that an allegation that Democrat voters will vote for Republican candidates showed a "sufficient degree of cohesiveness" to satisfy this prong of the analysis, *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 956 n.23 (4th Cir. 1992), at least one other court has expressed a different view. In *Pope v. Blue*, 809 U.S. 392, 396 n.3 (W.D. N.C. 1992) (three-judge court), *aff'd* 506 U.S. 801 (1992), the three-judge court commented:

> Perplexingly ... a substantial minority of the plaintiffs in this case are registered as members of the Democratic Party or as Independents. Inclusion of these plaintiffs substantially detracts from the plaintiffs' status as an 'identifiable group.' In the ensuing papers and at oral argument ... plaintiffs exclusively advanced the theory that their 'identifiable group' consisted of Republican voters. We will assume that the plaintiffs' action is premised on this theory, as it is the only coherent theory on which this litigation could advance.

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[1] Perhaps because the requirement that a plaintiff must show an "actual discriminatory effect" on that group is so difficult to demonstrate that partisan gerrymandering claims, like the one in this case, are frequently defeated on the third prong of the analysis.

And, contrary to the Vieth Cross-Appellees' contention, it is not clear from the *Bandemer* decisions whether the *Bandemer* plaintiffs were registered Democrats or, as here, simply individuals alleging they would vote for Democrat candidates. *See* 603 F. Supp. 1479, 1482 (S.D. Ind. 1984) (three-judge court) (referring to plaintiffs as "citizens of Indiana and members of the Democratic party"); *id.* at 1492 (noting that plaintiffs "align" themselves with the Democrat party); *see also* 478 U.S. at 115 (noting that plaintiffs were "several Indiana Democrats").

The meaning and application of the "identifiable political group" prong of the *Bandemer* analysis is squarely raised in this appeal and should be addressed, should this Court note probable jurisdiction and not summarily affirm.

III. The Cross-Appeal Is Not Improper

The Vieth Cross-Appellees seek to have this conditional cross-appeal dismissed as "unnecessary and improper" because Presiding Officers could have raised their arguments as alternative bases for affirmance. Motion to Dismiss at 1. Presiding Officers' institution of a cross-appeal, however, reflects a conservative approach reasonably dictated by the rules and the case law relevant to direct appeals. As such, dismissal on this basis would be unjust.

Current Supreme Court Rules 18.4 and 18.6, which pertain to direct appeals,[2] do not specify when it is appropriate to raise issues decided favorably to the opposing party below in a conditional cross-appeal as

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[2] In support of dismissal, Vieth Cross-Appellees cite to a discussion in Robert L. Stern, et al., SUPREME COURT PRACTICE §635 [sic] (8th ed. 2002) pertaining to cross-petitions for *certiorari*, not to direct appeals. *See* Motion to Dismiss at 2-3.

opposed to a Motion to Dismiss or Affirm. Prior to 1990, Supreme Court Rule 16.1(d) provided that the Court "would receive a motion to dismiss or affirm 'on any other ground that the appellee wishes to present as a reason why the Court should not set the case for argument.'" Stern, SUPREME COURT PRACTICE §7.11 at 487 (quoting former Rule 16.1(d)). Supreme Court Rule 10.5 provided: "The Court may permit an appellee, without filing a cross-appeal, to defend a judgment on any ground that the law and record permit and that would not expand the relief he has been granted." 28 U.S.C.A. (1984 bound volume). The evolution of the rules suggests that Presiding Officers *could have* urged the issues raised in their conditional cross-appeal as alternative basis for affirmance. The rules do not, however, suggest that such was the *only* way to present those issues to the Court.

The cases and commentary that have grown up around direct appeals undermine any certainty that a cross-appeal was unnecessary. *See Swarb v. Lennox*, 405 U.S. 191, 201 (1972) ("In the absence of a cross-appeal, the opposition is in no position to attack those portions of the District Court's judgment that are favorable to plaintiff-appellants"); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 157-58 & n.8 (1971) ("No cross-appeal has been taken from this partial grant of the requested injunction. We therefore have no occasion to consider whether the District Court's action was correct"); *Roemer v. Board of Public Works*, 426 U.S. 736, 756 n.20 (1976) ("There being no cross-appeal from the District Court judgment, this aspect of its ruling is not before us"); Wright, Miller & Cooper, 17 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D §4040, at 157 (1988 & 2002 Supp.) ("There has been *a start* at recognizing ordinary cross-appeal doctrine, by requiring a cross-appeal to seek affirmative relief from the judgment below but allowing without cross-appeal any argument advanced to support the judgment") (footnote omitted, emphasis added).

With this in mind, Presiding Officers elected to file a conditional cross-appeal to ensure their challenges were before the Court. Notably, they also cross-referenced the same two issues in the Motion to Dismiss or Affirm filed in response to the Jurisdictional Statement in Appeal No. 01-1873 and urged the Court to consolidate the appeal and cross-appeal should it entertain the appeal. *See* Motion to Dismiss or Affirm in No. 01-1873 at 9-10 n.6. An appellant should not be punished for this type of "belt and suspenders" approach. Even if the cross-appeal was technically unnecessary, it was not "improper" and should not be dismissed for that reason. The Vieth Cross-Appellees cite nothing to support their request for dismissal and treatment by this Court in other cases does not support dismissal. *See Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981) (where defendant filed direct appeal from three-judge court ruling finding state act unconstitutional and plaintiffs filed cross-appeal from the three-judge court's rejection of their alternative Commerce Clause challenge, this Court noted probable jurisdiction and consolidated the appeals).

CONCLUSION

For the foregoing reasons, in addition to those set forth in Cross-Appellants Jubelirer and Ryan's Jurisdictional Statement on Conditional Cross-Appeal, this Court should note probable jurisdiction of the cross-appeal and proceed to address the merits of the questions presented.

Respectfully submitted,

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